

**SEPARATE OPINION OF JUDGE YANAI**

I voted in favour of the Judgment since I substantially agree with its findings but I have reservations as to the way in which the amount of the bond was calculated.

1. The *Hoshinmaru* was licensed by the Russian Federation to catch certain limited quantities of sockeye salmon, chum salmon, sakhalin trout, silver salmon and spring salmon in the Russian exclusive economic zone from 15 May to 31 July 2007. When the *Hoshinmaru* was stopped and boarded by Russian officials on 1 June 2001, it was fishing with a valid licence in the area where it was licensed to fish and the fish on board corresponded to the species specified in the licence, namely, sockeye salmon, chum salmon and spring salmon. The amount of the three species on board was well within the limits set in the licence. Specifically, it is said that the *Hoshinmaru* had caught about 45,000 kg of sockeye salmon, of which approximately 20,000 kg had been recorded as cheaper chum salmon. However, the *Hoshinmaru* was licensed to catch 85,700 kg of sockeye salmon - which is more than four times the amount that was said to be falsely recorded - and 85,200 kg of chum salmon - which is again far more than said to be falsely recorded. So the alleged offence is not fishing without a licence or over-fishing; the alleged offence is falsely recording a catch that the vessel was entitled to take (Professor Lowe, Thursday, 19 July 2007, p.m., *ITLOS/PV.07/1*, p. 14).

2. The Respondent included in its calculation of the bond an amount of 7,927,500 roubles as compensation for damage allegedly caused by the *Hoshinmaru* to salmon and trout resources in the Russian exclusive economic zone. Thus this amount forms part of the bond amounting to 22,000,000 roubles proposed by the Respondent. I am not in a position to challenge the way the amount of compensation for the alleged damage was calculated under the internal laws and regulations of the Russian Federation. Nevertheless, I am not prevented from examining the facts and circumstances of the case to the extent necessary for a proper appreciation of the reasonableness of the bond as set by the Respondent. In my view, the following three factors are relevant to such an examination (paragraph 89 of the Judgment):

First, as stated in paragraph 1 above, the *Hoshinmaru* was fishing with a valid licence, and the falsely recorded amount of catch was well within the limits set in the licence. In this sense, the "*Hoshinmaru*" Case is different from cases the Tribunal has previously dealt with (paragraph 98 of the Judgment). When the competent authorities of the Russian Federation issued the licence to the *Hoshinmaru* on 14 May 2007, they must have ascertained that the amount of catch allocated to the *Hoshinmaru*, together with quotas for other national and foreign vessels, would not cause damage to salmon and trout resources in the Russian exclusive economic zone, let alone its environment. So I find it difficult to believe that the offence the *Hoshinmaru* committed by falsely recording the catch would cause damage to the conservation of salmon and trout resources in the Russian exclusive economic zone.

Secondly, as the Agent of the Respondent recognized, Japan and Russia have a long history of bilateral cooperation in fishery matters under the two agreements concluded between them in 1984 and 1985 (Mr Zagaynov, Friday, 20 July 2007, a.m., *ITLOS/PV.07/2*, p. 2). Japanese vessels fish salmon and trout in the Russian exclusive economic zone within this bilateral framework. In the conservation and management of anadromous stocks, both countries cooperate under the agreement of 1985, specifically through the Joint Commission established by it. In this connection, the Agent of the Applicant referred to this cooperation in the following statement:

I would like to point out, in this regard, the fact that Japan has been actively cooperating in order to promote the conservation and the reproduction of salmon and trout of Russian origin within the framework of a bilateral treaty with the Russian Federation. Japan has been providing, for example, a sizable amount of equipment for the good functioning of hatchery and nursery for salmon and trout in the Russian Federation and the scientists of both countries are in agreement that the salmon-trout resources in the exclusive economic zone of the Russian Federation where this incident occurred are conserved at a high level (Mr Komatsu, Thursday, 19 July 2007, p.m., *ITLOS/PV.07/1*, p. 6).

The Tribunal also notes the long-standing bilateral cooperation between Japan and Russia in the field of fisheries including the conservation and reproduction of salmon and trout of Russian origin in the Russian exclusive economic zone (paragraph 98 of the Judgment).

Thirdly, I would like to shed light on another aspect of fishing resources by comparing the present case with the "*Monte Confurco*" Case and the "*Volga*" Case. The *Monte Confurco*, a vessel flying the flag of the Applicant (Seychelles), was allegedly engaged in the unlicensed fishing of toothfish in the exclusive economic zone of the Kerguelen Islands in the French Southern and Antarctic Territories. The *Volga*, a vessel flying the flag of the Applicant (the Russian Federation), was allegedly fishing Patagonian toothfish without licence in the Australian exclusive economic zone. Both cases were considered to involve illegal, unregulated and unreported fishing, and the respective Respondents, France and Australia, expressed concern about the depletion of these stocks as a result of continuing illegal fishing in the area covered by the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (*The "Monte Confurco" Case, Judgment, ITLOS Reports 2000*, p. 110, paragraph 79; *The "Volga" Case, Judgment, ITLOS Reports 2002*, p. 33, paragraph 67). While a depletion of toothfish and Patagonian toothfish stocks is a matter of international concern and conservation measures have been taken under CCAMLR, salmon and trout resources in the Russian exclusive economic zone are conserved at a high level as mentioned above.

3. In light of the foregoing, the offence committed by the *Hoshinmaru* which is the false recording of the catch within the limits set in the valid licence cannot be considered as causing damage to salmon and trout resources in the Russian exclusive economic zone. If this relatively low degree of gravity of the offence and the above-mentioned aspects of fishing resources concerned had been adequately taken into account in the determination of the bond, its amount in the present case would have been set at a lower level.

(signed) S. Yanai